Supreme Court, U.S.
FILED
AUG 17 1994
OFFICE OF THE CLERK

(3)

NO. 94-126

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

LEE WEATHERLY,

Petitioner,

v.

FEDERAL DEBT MANAGEMENT, INC.

Respondent.

BRIEF OF BETH LILLIE AS AMICUS CURIAE SUPPORTING PETITIONER LEE WEATHERLY AND THE TEXAS FOUR-YEAR STATUTE OF LIMITATIONS

Paul E. Nunu
Counsel of Record
1235 Harvard Street
Houston, Texas 77008
Telephone (713) 868-6868
Telecopy (713) 861-6868

Attorney for Beth Lillie, as Amicus Curiae

83 pp

QUESTION PRESENTED

I. Under FIRREA, does public policy justify the extension of the FDIC and RTC's six year statute of limitations to third party assignees when the purported reason for the public policy no longer exists, i.e., the RTC is no longer engaged in making outright sales of severely delinquent assets to third parties?

II. Under FIRREA, the six year statute of limitations is extended to the FDIC and RTC. The statute is a comprehensive statutory scheme and is silent as to the rights of third party assignees. Under *O'Melveny & Myers v. Federal Deposit Insurance Corporation*, 114 S.Ct. 2048 (1994), does the state statute of limitations apply to loans in the hands of third party assignees?

LIST OF PARTIES

Petitioner:

Lee Weatherly
1512 Reston
Richardson, Texas 75081

Robert Renneker
12001 N. Central Expressway
Suite 600, LB 112
Dallas, Texas 75243-3733

Attorney for Petitioner

Respondent:

Federal Debt Management, Inc.
4015 Belt Line Road
Suite 100
Dallas, Texas 75244-2398

Steven T. Polino
Godwin & Carlton, P.C.
901 Main Street, Suite 3300
Dallas, Texas 75202-3714

Attorney for Respondent

Amicus Curiae:

Beth Lillie
E. I-10 Frontage
Schulenburg, Texas 78956-5656

Paul E. Nunu
1235 Harvard St.
Houston, Texas 77008

Attorney for Amicus Curiae

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(Ten copies of the RTC document referenced in the Appendix have been lodged with the Clerk of the Supreme Court of the United States)

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LIST OF ABBREVIATIONS

Federal Deposit Insurance Corporation ..... FDIC

Resolution Trust Corporation ..... RTC

Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ..... FIRREA

Case No. 93-1414 approved by RTC on June 29, 1993, Executive Committee Decision Memorandum ..... Memorandum

Judgments, Deficiencies and Charge-Offs ..... JDCs

A new plan or program recently implemented by the RTC pursuant to the Memorandum for the disposition and collection of JDCs, as well as other small balance non-performing assets ..... JDC Program

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Beth Lillie submits this Brief as Amicus Curiae supporting Petitioner *Lee Weatherly* and the application of the Texas four year statute of limitations to third party assignees of the FDIC and RTC.

STATEMENT OF INTEREST OF BETH LILLIE AS AMICUS AND PRELIMINARY STATEMENT

Beth Lillie has a significant interest in the issues presented to the Court because she is one of the many thousands of citizens whose alleged obligation is now in the hands of a third party assignee, and one of the thousands who could be significantly harmed if the FDIC and RTC's six year statute of limitations is transferrable. This brief is intended to bring relevant matters to the attention of the Court that have not already been brought to its attention by the parties; specifically, these matters should rebut any argument for the creation of special federal rules, erroneously based on federal interest, to extend the six year statute of limitations to assignees of the FDIC and RTC.

There is no federal policy or interest to justify the transfer of the FDIC and RTC's six year statute of limitations under FIRREA to assignees; nevertheless, the Texas Supreme Court has erroneously created a special rule extending 12 U.S.C. §1821(d)(14) to assignees based upon non-existent public policy. The only beneficiaries of such precedent are the assignees who have already purchased loans from the FDIC and RTC. The issue is moot as to any future sales because the RTC has discontinued outright sales of its severely delinquent assets (known as JDCs). Such sales are contrary to Congress' stated intent. The federal government and U.S. taxpayer will not benefit. **The losers will be the many thousands of citizens who must deal with the unjust and costly harassment of third party assignees.**

The Texas four-year statute of limitations should control the ultimate disposition of *Federal Debt Management, Inc. v. Weatherly*, 37 Tex. Sup. Ct. J. 555 (March 9, 1994) because FIRREA is silent on the issue of assignment to third parties and under *O'Melveny & Myers v. Federal Deposit Insurance Corporation*, 114 S.Ct. 2048 (1994), matters left unaddressed in comprehensive and detailed federal statutory scheme are presumably left subject to disposition provided by state law.

SUMMARY OF ARGUMENT

The Texas Supreme Court in *Weatherly*, and the U.S. Court of Appeals for the Fifth Circuit in *FDIC v. Bledsoe*, 989 F.2d 805 (5th Cir. 1993) have created a special federal rule transferring the FDIC and RTC's six year statute of limitations to purchasers of FDIC and RTC promissory notes under the guise of public policy and the common law of assignments. The common law of assignments does not apply to matters reserved to the sovereign, and no genuine public policy exists. Consequently, this Court's intervention is needed to prevent the proliferation of law based upon assumed public policy.

The lower courts have been lead to believe by third party purchasers of severely delinquent loans, and by misinformed FDIC and RTC counsel, that if 12 U.S.C. §1821(d)(14) is not extended, the market value of notes and other assets in the hands of the FDIC [or RTC] would diminish, hindering [the] statutory purpose. *See Federal Debt Management, Inc. v. Weatherly 37 Tex. Sup. Ct. J. at 557.* Further, they argue that it would only serve

to shrink the private market for such assets. *See Fall v. Keasler, 1991 WL 340182, at 4 (N.D. Cal. Dec. 18, 1991).* As this brief will demonstrate, these arguments are not only erroneous but are now moot.

ARGUMENT

The RTC is an instrumentality of the United States owned by the FDIC and was created pursuant to FIRREA. It is charged with carrying out Congress' intent. 12 U.S.C. §1441a(b)(4) makes 12 U.S.C. §1821(d)(14) applicable to the RTC.

The attached *Appendix* contains true and correct excerpts of a certified copy of RTC Executive Committee Decisional Memorandum, Resolution/Control No. 93-1414, as approved on June 29, 1993 by the RTC Executive Committee (the "Memorandum"). The Memorandum is a public record of which this Court may take judicial notice.[1]

By approving the Memorandum, the RTC made a significant change in its disposition policy, i.e., it decided to discontinue outright sales of severely delinquent assets to third parties, in favor of retaining an interest in the assets and their proceeds using limited partnerships. This policy change should eliminate any notion that the disposition of RTC assets will be prejudiced if the six year statute of limitations is not extended to purchasers of FDIC and RTC assets.

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[1]Ten copies of the Memorandum have been lodged with the Clerk of the Supreme Court of the United States.

I. Public policy arguments for extending the six year statute of limitations are now moot since the RTC has abandoned outright sales of severely delinquent assets.

The subject of the Memorandum is the creation of a new plan or program involving limited partnerships for the disposition and collection of judgments, deficiencies and charge-offs ("JDCs"), as well as small balance non-performing assets ("JDC Program"). Substantially all of the RTC's remaining assets in immediate jeopardy of being time barred by state statutes of limitations are among the assets placed in the JDC Program.

The RTC's mission statement, as provided in its Strategic Plan dated December 31, 1989 and approved by Congress, provides, in pertinent part, that the RTC will dispose of residual assets in a manner that will maximize return and minimize loss.

Recent sales of JDCs have generated minimal net proceeds of "less than 1% of the JDCs' principal amount". *See Appendix at page A-1.* Obviously, outright sales of JDCs have failed to maximize proceeds to the RTC, thus the RTC has abandoned such sales. It must logically follow that if sales to third parties of severely delinquent assets have been discontinued and are not in the RTC's best interest, then no federal policy or justification for extending the six-year statute of limitations to third party assignees exists and the issue is now moot.

The FDIC and RTC's alternative to selling severely delinquent assets, as acknowledged in *FDIC v. Bledsoe*,

989 F.2d 805 (5th Cir. 1993), is to hold onto them and prosecute them on their own behalf. This is precisely what the RTC has determined is the right thing to do by retaining an interest in a pool of JDCs that allows the RTC to participate in the recoveries. *See Appendix at page A-2.* The JDC Program structure has been determined to be more advantageous than outright sales. *See Appendix at page A-2.*

FIRREA is a comprehensive and detailed federal statutory scheme that is silent as to whether third parties should benefit from the six year statute of limitations specifically reserved to the FDIC and RTC under 12 U.S.C. §1821(d)(14). Matters left unaddressed in comprehensive and detailed federal statutory scheme are presumably left subject to disposition provided by state law, *O'Melveny & Myers v. Federal Deposit Insurance Corporation*, 114 S.Ct. 2048 (1994).

There is no clear evidence of legislative intent to support the extension of 12 U.S.C. §1821(d)(14) benefits to third party assignees, nor is there any current federal policy or interest. Consequently, state statutes of limitations should apply to loans that have been purchased from the FDIC and RTC by third parties.

Implementation of the JDC Program means that the only conceivable beneficiaries of granting the extension of 12 U.S.C. §1821(d)(14) to assignees, would be assignees who already own notes formerly owned by the FDIC or RTC. Neither the federal government or U.S. taxpayer will benefit from such an outcome. Therefore, the public policy argument relied upon by the Supreme

Court of Texas in *Weatherly* and the Fifth Circuit in *Bledsoe* is incorrect, moot, contrary to Congress' stated intent, and contrary to public policy.

II. Extension of the FIRREA six year statute of limitations to assignees would provide legal precedent for transferring other FIRREA rights to assignees.

The RTC's mission statement provides, in pertinent part, that the RTC will dispose of assets in a manner that will minimize the impact on local real estate and financial markets.

Extending the FIRREA six year statute of limitations to assignees would also create legal precedent for extending other FIRREA rights that should only be reserved to the sovereign. If other FIRREA rights are extended by such precedent, local real estate and financial markets could be significantly damaged, contrary to Congress' stated intent.

A holding that the FIRREA six-year statute of limitations is a right that is transferable to third party assignees creates legal precedent for transferring other rights reserved only to the sovereign by FIRREA. For example, 12 U.S.C. §1825(b)(2) and (3), of FIRREA, provides as follows:

> "(b) When acting as a receiver, the following provisions shall apply with respect to the Corporation: (2) No property of the Corporation shall be subject to levy, at achment, garnishment,

> foreclosure, or sale without the consent of the Corporation, nor shall any involuntary lien attach to the property of the Corporation; (3) The Corporation shall not be liable for any amounts in the nature of penalties or fines, including those arising from the failure of any person to pay any real property, personal property, probate, or recording tax or any recording or filing fees when due."[2]

If 12 U.S.C. §1825(b)(2) and (3) were extended to assignees of RTC and FDIC real property, then one of the greatest incentives for owners of such assets to pay their taxes, mortgages, interest and penalties timely, i.e., threat of foreclosure and penalties, would vanish. Hundreds of millions of dollars in budgeted tax revenues would likely be lost or deferred, causing significant harm to state and local taxing authorities.

CONCLUSION

The statute of limitations establishes a deadline after which the defendant may legitimately have peace of mind; it also recognizes that after a certain period of time it is unfair to require the defendant to attempt to piece together his defense to an old claim. *Walker v. Armco Steel Corp.*, 446 U.S. 740, 751 (1980). They are practical

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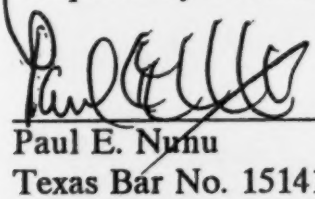
[2]Corporation is defined as the FDIC, however, 12 U.S.C. §1441a(b)(4) and §1823(d)(1)(A), extend certain privileges of the FDIC to the RTC.

and pragmatic devices to spare the courts from litigation of stale claims, and the citizens from being put to his defense after memories faded, witnesses have died or disappeared, and evidence has been lost. *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945) citing *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-349 (1944).

FIRREA is a comprehensive statute with a comprehensive provision regarding state statutes of limitations. If Congress had intended for third party assignees to enjoy the benefits reserved in the FDIC and RTC, it could have easily included statutory language addressing the matter. Therefore, based upon *O'Melveny*, the Texas four year statute of limitations should control.

For the various reasons provided herein, and the reasons provided in *Weatherly's* Petition for writ of certiorari, *Weatherly's* petition for writ of certiorari should be granted.

Respectfully submitted,



Paul E. Nunu
Texas Bar No. 15141850
Fed. Admis. no. 6543
Counsel of Record

1235 Harvard Street
Houston, Texas 77008
Telephone: (713) 868-6868
Telecopy: (713) 861-6868

Attorney for Beth Lillie
as Amicus Curiae

APPENDIX

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Excerpt from RTC Executive Committee Decisional Memorandum, Resolution/Control No. 93-1414, (ten (10) copies of which have been lodged with the Clerk of the Supreme Court of the United States) at Case: Page 3:

"**BACKGROUND**

The RTC has been disposing of most of its Assets through auctions or competitive sealed bid sales. While these sales give the RTC an expeditious and efficient means of disposition, they have not enabled the RTC to participate in the substantial proceeds that are expected to be realized by active collection efforts on the Assets.

To allow RTC to participate in the expected upside of JDC collections, RTC plans to place its remaining inventory of JDCs and other small-balance non-performing assets into limited partnerships. Large auctions or sealed bid sales of JDCs are not expected to maximize proceeds to the RTC because of the lack of market depth to absorb quickly the RTC's large volume of JDCs at competitive pricing. This is evidenced by recent auction results (e.g., the $800 million JDC auction in Atlanta held on December 10, 1992, where RTC received, after expenses, **less than 1% of the JDCs' principal amount.**) Given the rapidly

decreasing time frame to collect on the Assets prior to the expiration of the statutes of limitations governing their collectibility, the RTC needs to proceed in an expedited fashion." [emphasis added]

Excerpt from RTC Executive Committee Decisional Memorandum, Resolution/Control No. 93-1414, (ten (10) copies of which have been lodged with the Clerk of the Supreme Court of the United States) at Case: Page 4:

"**RATIONALE FOR A LIMITED PARTNERSHIP STRUCTURE WITH A SHARING OF THE COLLECTION PROCEEDS**

A limited partnership will be utilized to place pools of JDCs under the management of a number of private sector entities serving as General Partners, so that collection efforts can be initiated with limited additional cost to the RTC.

This structure is more advantageous than either outright sales or a collection company contract for the following reasons:

+ Recoveries are highly uncertain. To reflect the substantial unknown risks, JDCs are deeply discounted when they are sold. **Retention of an interest in a pool of JDCs**

allows the RTC to participate in the recoveries. The Financial Advisor to the RTC for the JDC Program, Financial Conservators, Inc. ("FCI"), advises that the aggregate collections on the JDCs may total 5% to 10%. If RTC receives 45% to 50% of the collection proceeds*, then RTC could reasonably expect to receive proceeds that exceed the net proceeds normally received from sales of JDCs.

* The percentage of proceeds paid to RTC will vary within 5% based upon Bids received. The Financial Advisor expects most Bids to come in at 50% for JDCs.

If, for example, the partnerships collect an aggregate of 5% on $8 billion (principal amount) of JDCs, or $400 million, the RTC would receive proceeds of approximately $200 million (less RTC's portion of Permitted Partnership Expenses). If RTC instead sold the assets and netted, after expenses, less than 1% (based on the recent auction results), RTC would have received less than $80 million.

+ RTC, through its JDC Program Coordinators in the field offices, is compiling an inventory of the JDCs. Unlike prior JDC sales, RTC will not incur any due diligence expenses in preparing the JDCs

for the JDC program. While RTC plans to retain a firm to monitor the activities of each partnership, the RTC will not incur the other major expenses often incurred from the sale of a portfolio of JDCs (e.g., compensation of auction firm, imaging or other preparation of the documents for the sale, rental of storage space or auction room).

+ Outright sales of JDCs typically involve both due diligence by a third-party firm in preparation for the sale and a period of due diligence by interested investors. In the JDC Program, the time involved in this process will be eliminated.

+ Using multiple small limited partnerships, the RTC can achieve its primary objective of obtaining the most attractive pricing, while encouraging participation by MWOBs and small investors.

+ Under the alternative possibility of contracting with collection companies, RTC would incur additional costs of performing due diligence and preparing the Assets for collection efforts.

+ By maintaining ownership, RTC would have a greater potential legal liability exposure from the activities related to the collection efforts.

+ In the proposed limited partnership, the Assets are immediately placed into the control of private industry for appropriate legal and ethical collection efforts." [emphasis added]